To the Supreme Court of the United States:

ABRAM W. HENDRY and JOHN MILLARD, of Liverpool, Province of Nova Scotia, Dominion of Canada, petition for a writ of *certiorari* directed to the Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the case of (the Steamship "Chattahoochee") ABRAM W. HENDRY *et al.*, Libellants, Appellants, *v.* THE OCEAN STEAMSHIP CO., Claimant, Appellee, intervening as owners of the Steamship Company.

Your Petitioners respectfully allege:—

First, That your Petitioners were at the times hereafter mentioned the owners of the British Schooner "Golden Rule," and that the Ocean Steamship Company was and is the owner of the Steamship "Chattahoochee."

Second, That on July 7, 1894, the Schooner "Golden Rule" left the port of Ponce, Island of Porto Rico, loaded with a cargo of sugar and molasses, bound for Boston, Massachusetts.

That on Thursday, July 20, 1894, while about sixty-five (65) miles south of the Island of Nantucket, said Schooner "Golden Rule" was run into and sunk by the Steamship "Chattahoochee," whereby the said Schooner and her cargo became a total loss.

Third, That on July 31, 1894, your Petitioners filed a libel in the District Court of the United States within and for the District of Massachusetts for damages sustained by reason of the collision, in which they alleged that the said collision was caused wholly by reason of the fault and negligence of the Steamship "Chattahoochee" and those in charge of her.

On August 23, 1894, the answer of the Claimant of said Steamship, The Ocean Steamship Company, was filed in said Court, in which it was alleged that the collision was caused solely by the negligence of the Schooner "Golden Rule" and those in charge of her, and that said Steamship was wholly without fault.

Fourth, That thereafter, on February 8th and 9th, 1895, the said case was tried before the Honorable Thomas L. Nelson, Judge of the United States District Court for the said District of Massachusetts, who, on July 18, 1895, delivered an opinion, which opinion is found on pages 137, 138 and 139 of the Record. In said opinion the Steamship "Chattahoochee" was found at fault for the collision for proceeding at more than a moderate rate of speed in a fog, and the Schooner "Golden Rule" was also found at fault for proceeding at more than a moderate rate of speed in a fog, and the damages were divided.

Fifth, That thereafter an appeal was taken by your Petitioners to the Circuit Court of Appeals for the First Circuit. The case came on for argument in said Court, and was heard before Judges Colt, Putnam and Webb, in said Court, and on June 12, 1896, an opinion was filed in which the decree of the District Court was affirmed, the Honorable William L. Putnam delivering the opinion (a copy of which is a part of the Record in this case) which found, viz:—

(*a*) That no appeal having been taken by the Claimant, the Steamship was at fault for proceeding at more than a moderate rate of speed in a fog, which the District Court finds to have been at the rate of eleven (11) miles an hour.

(*b*) That the Schooner "Golden Rule" was also at fault for proceeding at more than a moderate rate of speed in a fog.

Sixth, That the Circuit Court of Appeals for the First Circuit should have found that the rulings of law and findings of fact of the District Court were not warranted

by the evidence, failed to make other rulings and findings that should have been made, among others, —

(1) In finding that the Schooner "Golden Rule" was proceeding at more than a moderate rate of speed in a fog in a place where the collision took place.

(2) In not finding that the negligence of the Steamship "Chattahoochee" was the sole cause of the collision.

(3) In finding that the speed of the Schooner "Golden Rule" in any way contributed to the collision.

(4) In finding that the Act of Congress of February 13, 1893 (Chap. 105), did not in any way change the rule of law in relation to the recoupment of damages in cases of collision, where there was mutual fault.

Seventh, That the said Circuit Court of Appeals for the First Circuit made certain rulings of law in said cause which are different from the rulings of law made by the Supreme Court of the United States and the United States Courts in other Circuits of this country.

Eighth, That a writ of certiorari should issue in this case on the following grounds: —

1. That the Circuit Court of Appeals has held that the Schooner "Golden Rule" was proceeding at more than a moderate rate of speed in a fog.

The Court finds that from five (5) to six (6) knots in a fog is excessive speed for a sailing vessel in the open ocean, *even where the sailing vessel has the right of way*.

WHAT IS A MODERATE RATE OF SPEED FOR A SAILING VESSEL IN A FOG IN THE PLACE WHERE THE COLLISION TOOK PLACE?

We call the attention of the Court to the fact that there is not as yet a reported case where a sailing vessel has been held in fault for going at more than a moderate rate of speed in a fog in mid-ocean.

All reported cases have been those where they were either in narrow channels or in crowded waters.

In the case of the "John Hopkins," 13 Fed. Rep. 185, where a collision took place in a dense fog off Chatham, between a sailing vessel going at the rate of nine knots per hour, and a steamship going at the rate of four knots per hour, the speed of the sailing vessel was held to be excessive in such a frequented place.

In the case of the "Rhode Island," 17 Fed. Rep. 554, Judge Brown held that eight knots was an excessive rate of speed for a sailing vessel in Long Island Sound, near Eaton's Neck. A speed of about five (5) knots was held not to be excessive in the English Channel, near Lizard Light, off the port of Falmouth, where the collision was with a steamer.

In this case the steamer, which was a steam-tug, was going between seven (7) and eight (8) knots, and was held alone in fault. She did not hear a fog signal from the sailing vessel.

The "N. Strong," L. R. (1892), P. Div. 103.

In the case of the "Elysia," 4 Asp. 540, the English House of Lords held that five (5) knots per hour was a moderate rate of speed in a fog for a sailing vessel, with all sails set, off the Banks of Newfoundland, where the steamship was held to blame for going at the rate of eight (8) knots per hour. In that case the steamship's witnesses estimated the speed of the sailing vessel at nine (9) knots.

The Court in that case states that the sailing vessel should be well under command, and that speed in a narrow channel is not to be taken as a test for a sailing vessel.

In the case of the "Nacoochee," 137 U. S. 331, where the collision was off Cape May, the schooner, with all sail set, was going between four (4) and five (5) knots per hour, and the steamship between six (6) and seven (7) knots. The steamship was held alone to blame.

In the case of the "Morning Light," 2 Wall. 550, the Supreme Court of the United States held that a speed of from five (5) to six (6) knots per hour in a fog at night was not a fault for a sailing vessel at the entrance to Vineyard Sound.

In this connection, the language on page 406 of Marsden on Collisions is important: "It is submitted that the decisions as to what is a 'moderate' speed for small sailing ships bear heavily upon such vessels, and that they should not be carried any further."

In the case at bar, the fog was not dense. Those on the schooner saw the steamship quite a distance off, which shows that in this case it was not a thick fog.

In England, the Court has used the following language (Brown, L. J, in "The Beta," L. R. 9, P. Div. 134), in speaking of sailing vessels, viz.: —

"THE TERM 'MODERATE' IS A RELATIVE TERM; IT DEPENDS ON PLACE, ON THE KIND OF SHIP, AND ON THE KIND OF FOG."

The case of the "Zadok" (L. R. 9, P. Div. 114), was the case of a collision in the English Channel, where there were a great many vessels constantly passing.

Here the Court holds that the "Zadok" was in fault under all of the circumstances.

Here there was no fault on the part of the steamer. The Court used the following language, p. 117: —

"Of course, in the case of a sailing vessel, we know that she must have way on to fill her sails, otherwise she will not have the power of controlling her movements."

Again, Sir James Hannon says: —

"Some margin must be allowed for the particular circumstances of the case, and it is not to be said that exactly the same rule would apply *to a sailing-vessel out in mid-ocean*; but when one has to deal with a case like this, of a vessel which is passing across a course in which it is to be expected that numerous vessels may be, it is her duty to reduce her speed, as I have said, to as low a rate as is consistent with her keeping a good steerage way."

In the case of the "N. Strong" (*supra*), the Court says: —

"I AGREE THAT WHETHER THE POSITION OF THE VESSEL IS IN THE OPEN SEA, OR IN A RIVER LIKE THE THAMES, OR

OFF A DIFFICULT COAST, IS A MATTER WHICH HAS TO BE TAKEN INTO CONSIDERATION."

We submit that the speed of the Schooner "Golden Rule" was moderate.

WAS THE SCHOONER "GOLDEN RULE" PROCEEDING AT A MODERATE RATE OF SPEED, UNDER ALL OF THE CIRCUMSTANCES?

The position of the Schooner "Golden Rule" was in mid-ocean; she was out of the usual track of ocean steamships.

Page, Record, p. 22, Int. 87.

The master of the "Chattahoochee" says he went outside to be out of the usual track of vessels.

Savage, Record, p. 81, Int. 23.

The master of the Schooner, who knew that it was his duty to keep clear of all vessels that he should meet, except steam vessels, was bound to keep such speed on his vessel as would enable him to do so.

It seems that he had been considering this when he took in part of his square sail.

In speaking of it he says, Page, Record, p. 21 :—

"Q. 74. How fast do you think you were going at the time of the collision? A. Well, I couldn't judge correctly — between five and six knots. It was smooth. The vessel was standing straight up. I had looked over her side some time before that in regard to her speed, to see whether it was prudent to shorten sail, and I didn't; I considered it was just nice working speed — I could wear ship or tack ship or anything, and my yards were braced for that occasion, in case I met another vessel and she had the right of way."

He thus shows that he had his vessel in such shape as to avoid those which the law required him to avoid.

According to the testimony of her captain, the Schooner "Golden Rule" was sailing only at the rate of speed that,

considering the density of the fog, she could easily avoid any vessel whom she might meet, and which it was her duty under the law to keep clear of. This is the test of moderate speed that has been laid down by the different Courts of this country when applied to steamships.

Ships under sail cannot, of course, stop and reverse as can those under steam, but they must sail at such a rate in a fog that they can manœuvre sufficiently to avoid vessels having as to them the right of way.

Article 13 of the sailing rules applies not merely to a fog, but also to a falling snow, and would be interpreted by the Court to apply to any kind of thick weather.

What then would be the duty of a sailing vessel in a snow storm as to speed ; would she be obliged to take in all her sail? And even under bare poles she might go at a greater rate than eight (8) knots with a gale blowing behind her. We think this shows that the test we have given is a true one.

It should be noted that part of the large square sail of the Schooner was taken in.

2. The Circuit Court of Appeals for the First Circuit has held that, notwithstanding the passage of the Act of Congress of February 13, 1895 (Chapter 105), in this cause the damages to cargo might be recouped against the vessel carrying the same. It is contrary to the doctrine as laid down and followed in the Second Circuit as stated in "The Viola," 59 Fed. Rep. 632 and 60 Fed. Rep 296. This involves the construction of the so-called Harter Act, to which a different construction is given in the Courts of another Circuit.

If the doctrine of the Court which decided the case at bar is the correct doctrine, then the effect of the Statute is done away with and the vessel carrying the cargo would be held liable for the *fault or negligence* of those engaged in her navigation.

This is a different construction than is given by a United States Court in another Circuit on the same Statute.

We call to the attention of the Court that a writ of certiorari has already issued from this Court to the United States Circuit Court of Appeals for the Second Circuit where the construction of this same statute is raised, and they are now pending in this Court.

The United States Circuit Court of Appeals for the First Circuit has also stated in the case at bar that it is not prepared to admit that the provisions of this Statute were intended to apply to a foreign vessel. A different construction has been given by other United States Courts in the following cases: —

The "Etona," 64 Fed. Rep. 880 (S.D.N.Y.).
The "Florence," 65 Fed. Rep. 248 (S.D.N.Y.).
The "Silvia," 68 Fed. Rep. 230 (2 Cir. App.).
The "Carib Prince," 68 Fed. Rep. 254 (2 Cir. App.).

The statutes limiting liability have been held by this Court to apply to foreign vessels as well as to vessels of this country.

The constructions of these two statutes must in this particular be the same.

3. That the speed of the Schooner "Golden Rule," even if excessive, was not material in the case at bar.

The course of the Schooner was north by east, one-half east; that of the Steamship southwest, one-half west. *When, therefore, the Schooner's horn was heard on the starboard bow of the Steamship, she had passed the point of intersection of the two courses, and if the Steamship had held her course no collision would have taken place.*

The real cause of the collision was the porting of the helm on the part of the Steamship before she knew the position of the Schooner.

A glance at the diagram marked "Exhibit A" at once shows this to be true.

THE SPEED OF THE SCHOONER "GOLDEN RULE," THEREFORE, DID NOT CONTRIBUTE TO THE COLLISION.

Even if the Court should find that the Schooner "Golden Rule" was in fault in proceeding at the rate of speed which she was sailing, still this speed did not contribute to or cause the collision.

The direct cause of the collision, as heretofore shown, was the fact that the Steamship "Chattahoochee" ported her helm and swung to starboard. At the time this was done, the "Chattahoochee" was going at full speed. If she had either held her course or put her helm to starboard, no collision would have taken place.

We desire to call the attention of the Court to the language used by Judge Lacombe in a similar case.

The "Martello," 39 Fed. Rep. 509.

"*Nor did the 'Willey's' speed prevent the 'Martello' from avoiding the collision, because, had the latter been going at a lower rate of speed, had she stopped her engines when she heard the 'Willey's' horn, and reversed (as she did) when she sighted the barkentine, she would have stopped short of the 'Willey's' track, whether the barkentine was going fast or slow.*"

And even if the speed of the Schooner was immoderate, this was not a fault which contributed to the collision.

It was the duty of the Schooner to hold her course, and not in any way to mislead the Steamer. If the Steamer had done what the law required her to do, no collision would have taken place, as she would, if she had been going at a moderate rate of speed, or had stopped and reversed, or had not put her helm to port, but merely held her course, have gone clear of the Schooner.

Her faults are clear, and the fault of the Schooner, if she was at fault, is one which did not cause the collision.

If the Steamship had held her course, no collision would have taken place, and this is acknowledged by her master.

Savage, Record, p. 93.

In the case at bar, gross faults of the Steamship are clearly shown, the only fault that is found against the Schooner being that she was proceeding at more than a proper rate of speed in a fog, under all the circumstances. It would seem that the rule that has been laid down by the Courts in a number of cases, that where one vessel is found grossly in fault, the acts of the other will not be so particularly scrutinized, has a direct application to this case.

The "City of New York," 147 U. S. 72.

In that case, the change of course of a sailing vessel in a fog was held not to be such a fault as to cause a division of damages where the steamship was grossly in fault in going at an excessive rate of speed in a fog.

The language used in the "Comet," 9 Blachf. 323, has, in this case, great force: —

"The case is one for the application of the rule that a vessel which is primarily at fault for a collision cannot shift its consequences in part upon the other vessel, without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster." (Cited with approval by the Circuit Court of Appeals for the Second Circuit, in the case of

The "John King," 49 Fed. Rep. 469.)

A sailing vessel, in order to manœuvre, must have a speed sufficient to enable her to change her course and keep clear of vessels to whom she owes a duty.

ON THIS QUESTION WE SUBMIT THAT IN NONE OF THE CASES HAS A SAILING VESSEL BEEN HELD TO BLAME IN A COLLISION WITH A STEAMSHIP FOR GOING AT A RATE OF SPEED, IN A FOG IN MID-OCEAN, NO GREATER THAN THE SPEED OF THE "GOLDEN RULE" AT THIS TIME.

4. That even if the Court found the Schooner at fault for excessive speed in a fog, and the Court found

excessive speed was a fault on her part, and that the fault contributed to the collision, we submit that the damages should not be divided equally between the two vessels.

There is an intimation of the Supreme Court in the "Max Morris," 137 U. S. 1, to this effect, where the Court says:—

"Whether in a case like this (mutual fault), the decree should be for exactly half damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

In the case of the "Victory," found in 68 Fed. Rep. 395, the Circuit Court of Appeals for the Fourth Circuit (Mr. Chief-Justice Fuller presiding) apportions the damages on a different basis, this being a case of mutual fault, as will be shown on pages 399 and 400 of the opinion. In that case one vessel is made to pay much more than the other, on the ground that the faults of the "Victory" were the chief cause of the disaster, and the course that she pursued was almost wilful. This has a direct bearing on the case at bar, where the Steamship proceeded at full speed in a dense fog, contrary to the provisions of the statute, and where her master wilfully infringed what he knew to be the rule of the road at sea in a fog.

WHEREFORE, your petitioners pray that a writ of *certiorari* may be granted by this Honorable Court to the Circuit Court of Appeals for the First Circuit.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Proctors for Petitioners.

ABRAM W. HENDRY,
JOHN MILLARD,
By ADDISON C. BURNHAM,
their Attorney.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. CITY OF BOSTON.

I hereby certify that on the fifth day of October, 1896, before the subscriber, a Notary Public for the Commonwealth of Massachusetts, in and for Suffolk County, personally appeared ADDISON C. BURNHAM, for and in behalf of ABRAM W. HENDRY and JOHN MILLARD, and made oath that the matters and facts contained in the foregoing petition are true as therein set forth, to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal the day and year above written.

[SEAL] STEPHEN R. JONES,
Notary Public.

I, EUGENE P. CARVER, duly admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for a writ of *certiorari*, and in my judgment, from the matters stated therein, the writ ought to issue.

EUGENE P. CARVER.